

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Gerald and Sharon)	
Fuerstenberg to Construct Two Cranberry)	Case No. 3-WC-93-2164
Beds, Dikes, and a Reservoir in the Town)	
of Manchester, Jackson County)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER APPROVING WATER QUALITY CERTIFICATION

Gerald and Sharon Fuerstenberg filed an application with the Department of Natural Resources for water quality certification pursuant to 33 U.S.C. 1341, Section 401 of the Clean Water Act, and Chapter NR 299, Wis. Adm. Code. Certification was requested to construct two cranberry beds, dikes and a reservoir in the SE 1/4 of the SE 1/4 of Section 4, Township 20 North, Range 3 West, Town of Manchester, Jackson County, Wisconsin.

The Department of Natural Resources issued a Public Notice which stated that the certification would be granted 30 days from the date of publication of the notice unless a hearing was requested. A timely petition for hearing was received by the Department pursuant to § 227.42, Stats., from Berry Creek Cranberry Corporation, c/o Kay A. Finch.

Pursuant to due notice, including publication, a hearing was held on June 15, 1995, in Black River Falls, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Gerald and Sharon Fuerstenberg, Applicants
W8498 U.S. Highway 12
Black River Falls, Wisconsin 54615

Black Creek Cranberry Corporation, Objector, by

William Metcalf, Attorney
Crowns, Midthun, Metcalf & Quinn, S.C.
480 East Grand Avenue
P. O. Box 759
Wisconsin Rapids, Wisconsin 54495-0759

Wisconsin Department of Natural Resources, by

Michael D. Scott, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. Gerald and Sharon Fuerstenberg (Fuerstenbergs) own real property with a legal description of the SE 1/4 of the SE 1/4 of Section 4, Township 20 North, Range 3 West, Town of Manchester, Jackson County, Wisconsin. The Fuerstenbergs filed a state/federal application dated August 29, 1993, for water quality certification pursuant to § 401, Federal Clean Water Act and Chapter NR 299, Wis. Adm. Code.
2. The Fuerstenbergs intend to construct cranberry beds on their property. The number and layout of the cranberry beds has not been decided. However, the area of the beds will be approximately five acres.
3. Cranberry growing requires that the beds be flooded numerous times during the year. The beds are flooded in the spring, as needed during the growing season, for harvesting and after harvesting to keep the vines from freezing. Cranberry growing requires approximately six acres of water per acre of bed annually. The grower must be able to flood the beds quickly. Typically cranberry growers use reservoirs, high capacity wells or both to provide sufficient water for their beds.
4. The Fuerstenbergs intend to construct a reservoir adjacent (on the east side) to the proposed beds. The reservoir will be created by constructing an earthen dam measuring 150 feet long by fifty feet wide. The dam will impound water from Perry Creek and create a pond with a surface area between two and five acres and a maximum depth of eight to ten feet. A portion of the proposed dam and the reservoir will be located in designated wetlands. A culvert will be constructed between the reservoir and the cranberry beds. The culvert will contain a mechanism allowing the Fuerstenbergs to open the culvert and allow water from the reservoir to flood the cranberry beds when needed.
5. Construction of the reservoir will impact existing wetlands. As mentioned above a portion of the earthen dam (approximately 72 feet) will be built on wetlands. This portion of the wetland will be filled. Most of the reservoir will be located in the wetland. This portion of the wetland will be converted from wetland to a pond.
6. Although cranberry growing requires substantial amounts of water, it is not a water or wetland dependant activity.

7. Two alternatives exist for providing sufficient water to the cranberry beds at the proposed site. One alternative is to drill high capacity wells for the cranberry beds. The other alternative is to pump water from an existing reservoir which is located north of the proposed site for the cranberry beds and at approximately six feet lower elevation than the site of the proposed beds. Neither of these alternatives are economically practicable. The applicant presented estimates for both alternatives. The estimate of the alternative of supplying water to the beds from high capacity wells totalled \$188,604.96 and the estimate for the alternative of pumping water from the existing reservoir totalled \$190,904.96.

Based on these estimates, neither of these alternatives is economically viable. It should be noted that the estimates for both alternatives anticipate using electric motors to pump water. By far the most expensive component of both estimates is the cost of providing electric power to the site. This cost is estimated at \$164,500. No estimates for the cost of either alternative using gas-powered pumps rather than electric pumps were available. However, based on the expected return from this relatively small cranberry growing operation and the fact that the costs would be incurred immediately while no returns from selling cranberries would be realized for several years, even substituting gas-powered pumps for electric pumps, neither of the alternatives is economically practicable.

8. A third alternative, relocating the cranberry beds so the existing reservoir could be used without having to pump water, was also considered. Constructing the cranberry beds at a site where they could be flooded with water from the existing reservoir by means of gravity, would result in the destruction of a larger area of wetlands than the current proposal.

9. The objector is concerned with downstream impacts of the proposal. The objector is a cranberry grower located downstream from the applicants. The objector uses water from Perry Creek, along with other sources including high capacity wells, for its cranberry beds. The objector is concerned that during times of drought, the amount of water taken by the applicants for their cranberry beds will threaten the objector's operation. Based on the amount of water available in the Perry Creek watershed, the amount of water taken by the applicants, even during a drought, should not constitute a threat to downstream users including the objector.

A more important concern to the objector is that during a flood the earthen dam the applicants propose to construct could fail resulting in a rush of water down Perry Creek. Such an event could result in significant damage to the property of the objector. Although no attempt was made to quantify this risk, the threat of such an event undoubtedly exists. In reviewing the proposal, however, one must assume that the applicants will construct the dam in a responsible, workmanlike manner. If the dam fails as the result of negligence on the part of the applicants, they would be liable for any damage to the property of the objector resulting from the dam failure. The possibility of damage resulting from a flood or other

natural occurrence beyond the control of the applicants is not a reasonable basis for denying their application.

10. Other than the elimination of an area of wetland described in paragraph five, the proposed project will not have any significant adverse impacts on the affected wetlands including any cumulative impacts attributable to the proposed project or potential secondary impacts on wetland functional values.

11. The project as currently proposed will not result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences if it is undertaken in conformance with the conditions set forth in the order.

12. The area affected is not an area of special natural resource interest within the meaning of § NR 103.04, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to § 227.43(1)(b), Stats., and § NR 299.05(b), Wis. Adm. Code.

2. The proposed project will not result in violation of the standards contained in § NR 103.08(3), Wis. Adm. Code in that no practicable alternatives to the proposed project which will not adversely affect wetlands exist nor will the proposed project result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

3. The subject property is not located within an "area of special natural resource interest" within the meaning of § NR 103.04, Wis. Adm. Code.

4. The Department has the authority pursuant to § NR 299.05, Wis. Adm. Code, to approve water quality certification if it determines that there is reasonable assurance that the project will comply with the standards enumerated in § NR 299.04, Wis. Adm. Code.

ORDER

WHEREFORE IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact and Conclusions of Law, that water quality certification be granted subject to the following conditions:

1. The applicant must notify the Wisconsin Department of Natural Resources of his intent to start the discharge at least five business days prior to the beginning of the discharge.
2. Within five business days after the completion of the discharge, the applicant must notify the Department of Natural Resources of the completion of the discharge.
3. The applicant must allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.
4. None of the removed materials may be deposited or stored upon any part of the bed of the waterway below the ordinary high watermark, and all removed materials shall be placed out of the floodway of any stream.
5. The removal of vegetative cover and exposure of bare ground shall be restricted to the minimum amount necessary for construction. Areas where soil is exposed must be protected from erosion by seeding and mulching, sodding, diversion of surface runoff, installation of straw bales or silt screens, construction of settling basins, or similar methods as soon as possible after removal of the original ground cover and no later than when construction is completed.
6. This permit has been issued with the understanding that any construction equipment used is the right size to do the job, and can be brought to and removed from the project site without unreasonable harm to vegetative cover or fish or wildlife habitat. This permit may be rescinded or revoked if the Department determines that the conditions of this permit have not been followed or if it finds that activity to be detrimental to the public interest.

7. Removal of vegetative cover shall not take place until immediately before excavation commences.
8. The bank slopes after construction shall be no steeper than three feet horizontal to one foot vertical.

Dated at Madison, Wisconsin on July 19, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By



MARK J. KAISER

ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.